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 10 BRISKMAN HEATH

11  
 12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA  
 14 SAN FRANCISCO DIVISION

15 BOVIS LEND LEASE, INC. as assignee  
 16 of LNR-LENNAR BRANNAN STREET,  
 17 LLC,

18 Plaintiff,

19 vs.

20 MBH ARCHITECTS, INC. aka  
 21 McNULTY BRISKMAN HEATH and  
 22 DOES 1 through 150, inclusive,

23 Defendant.

24 CASE No. C 07-05262 JSW

25 REPLY BRIEF IN SUPPORT OF MBH  
 26 ARCHITECTS, INC.'S MOTION FOR  
 27 LEAVE TO FILE A THIRD PARTY  
 28 COMPLAINT AGAINST LNR-LENNAR  
 BRANNAN STREET, LLC

Date: April 18, 2008

Time: 9:00 a.m.

Courtroom: Hon. Jeffrey S. White

29 I. INTRODUCTION<sup>1</sup>

30 This is a simple and straightforward motion. MBH Architects, Inc. ("MBH")  
 31 seeks to implead LNR-Lennar Brannan Street, LLC ("Lennar") into this action based on a  
 32 contractual indemnity provision in a contract between the two parties. As set forth in the moving

33  
 34 <sup>1</sup> MBH respectfully requests that this Court consider this Reply Brief despite the fact that it was  
 35 not timely filed due to a calendaring error at Long & Levit. MBH originally filed this motion for  
 36 April 4, 2008. However, the Court informed counsel that the earliest such a motion could be  
 37 heard was April 18, 2008. MBH re-noticed the motion for that date, and believed that its Reply  
 38 Brief was not due until April 4, 2008, 14 days prior to the hearing date of April 18, 2008 under  
 39 Local Rule 7-3. On March 26, 2008 counsel discovered that this Reply Brief was in fact due on  
 40 March 21, 2008. It filed the Reply Brief on that same day. This late filing will not prejudice  
 41 Bovis because Bovis is not entitled to file a responsive pleading.

1 papers, the contract provides that MBH is entitled to indemnity from Lennar for all losses, costs,  
 2 claims, damages, liabilities and attorneys' fees which MBH incurs as a result of any negligent  
 3 errors, acts or omissions of Lennar or any other contractor or subcontractor employed or retained  
 4 directly by Lennar. (Declaration of John B. Sullivan In Support of Reply Brief In Support of  
 5 MBH Architects, Inc.'s Motion for Leave To File A Third Party Complaint Against LNR-Lennar  
 6 Brannan Street, LLC, ("Sullivan Dec." ¶5, Ex. 2, Ex.A).

7 This Court should disregard the arguments set forth in Bovis Lend Lease, Inc.'s  
 8 ("Bovis") opposition to this motion. Bovis' arguments are contradicted by the case law cited in  
 9 their own opposition to this motion and they lack merit. Instead, this Court should allow MBH to  
 10 implead Lennar as a third party defendant to assert its contractual right of indemnity for the  
 11 reasons set forth below.

12 Moreover, the Court should refuse to consider Bovis' request to remand this action  
 13 based on the local defendant rule. Bovis waived its right to seek such relief when it failed to file a  
 14 motion to remand this action within 30 days of it being removed from the state court. Moreover,  
 15 whether this action should be remanded was not put at issue by MBH's motion for leave to  
 16 implead a third party.

## 17 II. **LEGAL ARGUMENT**

### 18 A. **FRCP 14 Allows MBH To Implead Lennar To Assert Its Indemnification 19 Claim And Claim For Attorneys' Fees**

20 MBH may implead Lennar because Lennar may be liable for all or part of any  
 21 judgment obtained by Bovis. See *Andrulonis v. United States* (2nd Cir. 1994) 26 F.3d 1224,  
 22 1233. Bovis relied on the *Andrulonis* decision to support its contention that MBH cannot implead  
 23 Lennar in this action. However, the *Andrulonis* case establishes that the Court should allow MBH  
 24 to implead Lennar in this action.

25 In *Anrulonis*, the Second Circuit held that FRCP 14 "allows a defendant to bring in  
 26 a third party-party defendant even though the defendant's claim is purely inchoate--i.e., has not  
 27 yet accrued under the governing substantive law--so long as the third-party defendant may

1 become liable for all or part of the plaintiff's judgment." *Andrulonis*, 26 F.3d at 1233. The Court  
 2 held that FRCP 14(a) permitted a defendant to implead a joint tortfeasor for contribution before  
 3 the right to contribution accrued "because that third party 'may be liable to the defendant for a  
 4 share of the plaintiff's primary judgment'". *Id.* Such a claim is "properly characterized as  
 5 "contingent." *Id.*

6 This Court should allow MBH to implead Lennar because Lennar may be liable  
 7 for all or part of any judgment obtained by Bovis. Bovis contends that MBH breached its  
 8 standard of care as the architect on the project. (Complaint For Damages, Sullivan Dec., ¶ 5, Ex.  
 9 2). Under this contract, MBH is entitled to indemnity from Lennar for all losses, costs, claims,  
 10 damages, liabilities and attorneys' fees which MBH incurs as a result of any negligent errors, acts  
 11 or omissions of Lennar or any other contractor or subcontractor employed or retained directly by  
 12 Lennar. Thus, to the extent that MBH can establish during this litigation that many of these  
 13 alleged breaches were not caused by the actions of MBH, but instead by the actions of Lennar,  
 14 and its contractors and subcontractors, including Bovis, MBH is entitled to indemnity from  
 15 Lennar. Because Bovis cannot establish at this stage of the proceedings that the alleged breaches  
 16 were not caused by Lennar, or any of its contractors or subcontractors, this Court should allow  
 17 MBH to implead Lennar.

18 Moreover, Bovis assertion that none of the claims asserted by Bovis involve or  
 19 relate to any action or omissions by Lennar or any of its subcontractors is absurd. The dispute  
 20 between Lennar and MBH arose not in a vacuum, but on a construction site that involved MBH,  
 21 Bovis, Lennar and several other parties. Although MBH provided design services on this project,  
 22 other entities, including Lennar and Bovis, were involved in the implementation of these designs.  
 23 MBH contends that certain damages sought by Bovis in this litigation were not caused by the  
 24 design of services provided by MBH, but by the actions of Lennar and it contractors and  
 25 subcontractors.

26 Further, Bovis' claim that MBH's indemnity theory is circular is without merit.  
 27 Bovis is alleging that MBH breached its obligations under its contract with Lennar. MBH  
 28

1 contends that the negligence of Lennar and its subcontractors caused the damages sought by  
 2 Bovis. Under the agreement between Lennar and MBH, MBH is allowed to seek indemnity for  
 3 these damages. Had Lennar brought this action against MBH, MBH could have cross-  
 4 complained against Lennar based on this indemnity right. However, Lennar assigned its rights  
 5 and remedies under the contract to Bovis, and Bovis brought suit. Thus, MBH is forced to  
 6 implead Lennar.

7 Finally, MBH is entitled to attorneys' fees from Lennar or Bovis if it prevails on  
 8 this action. (Sullivan Dec., ¶5, Ex. 2, Ex. A.) Bovis has denied that it is responsible for this  
 9 attorney fee provision. (Sullivan Dec., ¶6, Ex. 3.) MBH's claim for attorneys' fees is related to  
 10 and derivative of Bovis' action for a breach of the contract between MBH and Lennar.

11       **B.     MBH's Causes of Action Related to Bovis' Complaint**

12       Bovis contends that MBH's claims against Lennar are completely independent of  
 13 those raised by Bovis. However, the very nature of an indemnity claim proves that this argument  
 14 lacks merit.

15       Impleader is commonly used to assert indemnity claims. Schwarzer, Tashima &  
 16 Wagstaffe, *California Practice Guide, Federal Civil Procedure Before Trial*, (2006), p.7-93,  
 17 7:311; citing *Gross v. Hanover Ins. Co.* (SD NY) 1991) 138 FRD 53, 54. "The crucial  
 18 characteristic of a third party complaint is that the original defendant is attempting to transfer to  
 19 the third party defendant the liability asserted by him against the original plaintiff." *Lambert v.*  
 20 *Inryco, Inc.* (WD OK 1980) 589 F.Supp. 908, 911. The third-party defendant need not be liable  
 21 to the original plaintiff. In fact, the original defendant may recover judgment on an impleader  
 22 claim even if the third-party defendant bears no direct liability to the original plaintiff. *Huggins*  
 23 *v. Graves* (6th Cir. 1964) 337 F.2d 486, 489; *Irwin v. Mascott* (ND CA 2000) 94 F.Supp.2d 1052,  
 24 1056-1057.

25       Here, MBH's claim for indemnity is related to this action. Bovis claims that MBH  
 26 breached its contract with Lennar and thus caused Lennar damages. MBH contends that the  
 27 negligence of Lennar as well as its contractors or subcontractors contributed to the damages

1 sought by MBH. It is entitled to indemnity to the extent that it can prove that the damages sought  
 2 by Bovis were caused by Lennar, its contractors or its subcontractors. Thus, the claims are  
 3 related.

4 Moreover, Bovis' reliance on *United States v. One 1077 Mercedes Benz* for the  
 5 proposition that impleader is improper is distinguishable. (9th Cir. 1983) 708 F.2d 444. In that  
 6 case, the United States sued to forfeit defendant's car for illegal activities. *Id.* at 452. The Ninth  
 7 Circuit held that the defendant could not rely on FRCP 14 to join federal agents who allegedly  
 8 violated her rights in seizing the car. *Id.* Unlike the defendant in *One 1077 Mercedes Benz*,  
 9 MBH's claim for indemnity from Lennar is related to and derivative of the allegations in Bovis'  
 10 complaint.

11       **C. Impleading Lennar Will Not Complicate The Issues**

12       Bovis claims that the Court should deny MBH's motion for leave to implead  
 13 Lennar because it will "complicate the issues". But Bovis' analysis is flawed because Lennar and  
 14 its contractors and subcontractors' conduct will be at issue in this case regardless of whether  
 15 MBH is allowed to implead Lennar.

16       Neither Bovis nor Lennar will be prejudiced by allowing MBH to implead Lennar.  
 17 The fact that Lennar would be forced to defend a claim for indemnity against it does not establish  
 18 prejudice. If so, a motion for leave to implead a party would always be denied on the ground that  
 19 it would prejudice the third party defendant. Further, Bovis will not be prejudiced if it incurs  
 20 costs while MBH attempts to prove that Lennar's negligence was the cause of damages sought by  
 21 Bovis. Regardless of whether the Court grants this motion, the conduct of Lennar, its contractors  
 22 and subcontractors will be an issue in this case. Because Bovis brought this action as an assignee  
 23 of Lennar, any negligent conduct on the part of Lennar can preclude Bovis from recovering  
 24 damages. Thus, Bovis will not be unduly prejudiced by allowing MBH to implead Lennar.

25       Moreover, the addition of Lennar will not complicate the issues. Despite Bovis'  
 26 assertion that its claims seek only to explore the professional standard of care of MBH, the  
 27 actions of Lennar and its contractors and subcontractors will certainly be at issue in this case for

1 the reasons stated above. MBH will contend that many of the costs Lennar incurred for delay and  
 2 remediation were not caused by MBH, but by Lennar and or its contractors and subcontractors.  
 3 Thus, allowing MBH to implead Lennar into this action to participate in the litigation of these  
 4 issues will not complicate the issues already in front of this Court. When the Court considers this  
 5 as well as the attorney fee provision in the contract between Lennar and MBH, allowing MBH to  
 6 implead Lennar will promote judicial economy by allowing the Court to resolve all of these issues  
 7 in one action.

8 Finally, Bovis cannot establish at this stage of the proceedings that MBH's third  
 9 party complaint has no merit. Bovis' contention that Lennar would never be liable to indemnify  
 10 MBH because Bovis' claims against MBH are for design related issues ignores the reality of  
 11 litigation arising out of the construction of a building. MBH contends and will establish that  
 12 several categories of damages sought by Bovis were not caused by its design services, but by the  
 13 action of Lennar and its contractors and subcontractors. Absent any evidence to the contrary  
 14 from Bovis, the Court should not deny this motion on the ground that it lacks merit.

15 **D. The Court Should Not Remand This Action**

16 The Court should deny Bovis' request to remand this action. Bovis has not made a  
 17 motion to remand this action in accordance with ND CA Rule 7.1. Moreover, the "no-local-  
 18 defendant" limitation of §1441(b) is procedural, not jurisdictional. *In re Shell Oil Co.* (5th Cir.  
 19 1991) 932 F.2d 1518, 1522. Thus, where a plaintiff fails to make a timely motion for remand on  
 20 the ground, the defect is waived as long as there is complete diversity. *In re Shell Oil Co.* 932  
 21 F.2d at 1522; *Korea Exchange Bank v. TrackwiseSales Corp.* (3rd Cir. 1995) 66 F.3d 46, 50.  
 22 Therefore, the Court should deny Bovis' request to remand this action.

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1       **III. CONCLUSION**

2                  For the foregoing reasons, this Court should allow MBH to implead Lennar into  
3                  this action and deny Bovis' request to remand this action.

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5                  Dated: March 26, 2008

LONG & LEVIT LLP

6                  By

7                    
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8                  JOHN B. SULLIVAN

9                  Atorneys for Defendant and Third Party  
10                 Plaintiff MBH ARCHITECTS, INC. aka  
11                 McNULTY BRISKMAN HEATH

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